Supreme Court, U. S.
FILED
JAN 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-616

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, ET AL.,
Respondents,

vs.

THE VILLAGE OF ARLINGTON HEIGHTS, ET AL.,
Petitioners,

NORTHWEST OPPORTUNITY CENTER AND ELUTERIA D. MALDONADO,
Intervening Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' BRIEF.

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PETITIONERS' BRIEF.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 517 F. 2d 409 and appears as Appendix A to the Petition for Writ of Certiorari filed herein. The opinion of the United States District Court for the Northern District of Illinois is reported at 373 F. Supp. 208 and is reprinted as Appendix B to the Petition for Writ of Certiorari filed herein.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 10, 1975; the order en banc denying the Petition for Rehearing was entered on August 13, 1975; the Petition for Writ of Certiorari was docketed October 23, 1975; the Petition for Writ of Certiorari was granted on December 15, 1975. The Petition for Writ of Certiorari was filed in accordance with 28 U. S. C. § 2101. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This case involves the Fourteenth Amendment of the Constitution of the United States; 42 U. S. C. A. §§ 1981-1982, the Civil Rights Act of 1866; 42 U. S. C. A. § 1983, the Civil Rights Act of 1871; 42 U. S. C. A. §§ 3601, *et seq.*, the Fair Housing Act of 1968. The relevant provisions are set forth in an Appendix to this brief.

QUESTIONS PRESENTED FOR REVIEW.

1. Does the failure to grant a rezoning request for multiple-family housing for low- and moderate-income families in the midst of a single-family area violate the Fourteenth Amendment, even though the Village was admittedly maintaining the integrity of its zoning plan and protecting neighboring property values?

2. Does an alleged discriminatory housing pattern in the Chicago metropolitan area impose upon a suburban municipality an affirmative duty to ignore its admittedly proper zoning ordinance in order to permit the construction of multi-family low- and moderate-income housing?

3. Is housing a fundamental constitutional right which requires the application of the "compelling interest" test?

4. Did the respondents overcome the presumption of validity attaching to the zoning ordinance of the Village of Arlington Heights?

5. Did the respondents have sufficient standing to litigate the merits of the zoning ordinance?

STATEMENT OF THE CASE.

The respondent, Metropolitan Housing Development Corporation, is a not-for-profit corporation organized for the purpose of developing low and moderate income housing in the Chicago metropolitan area. It has a 99 year lease and sale agreement with the owners of the subject property, which is a vacant 15 acre tract on the southeast corner of an 80 acre parcel owned by the Clerics of St. Viator who maintain a boys high school and a novitiate on the larger tract in the Village of Arlington Heights. The petitioners are the Village and the Village Trustees. The contract and lease under which the respondent claims an interest in the property is subject to rezoning for multiple-family purposes and the securing of a Section 236 financing commitment. The owners of the property are not parties to the lawsuit.

The subject property is zoned for R-3 One-Family Dwelling District under the Zoning Ordinance of the petitioners, Village, and has been zoned for single-family use since the first Village Zoning Ordinance. Under the Village Comprehensive Plan adopted in 1959, the property was designated for single-family use. Under the R-3 classification, property can be developed for single-family detached dwellings at a density of 8,750 square feet of lot area per dwelling unit. Approximately 50 single-family units can be placed upon the subject property. The purchase price of the subject property is $300,000.

The respondents propose to develop the land for 190 townhouses which were to be financed pursuant to Section 236 of the National Housing and Urban Development Act of 1968. All of the land surrounding the subject property is zoned and developed for R-3 single-family use. A map showing the existing land use and zoning and photographs of the development of the subject property and the surrounding area, which were received in evidence, appear in the Appendix Exhibit Volume (Def. Ex. 1 R. 693, 809, Def. Ex. 2 R. 700, 809, Def. Ex. 14, R. 704, 809).

Respondent applied for a zoning change to the R-5 multiple-family classification. After public hearings the Plan Commission recommended against the proposed rezoning and the Board of Trustees of the Village voted 6 to 1 to deny the requested rezoning. Suit was then instituted by the MHDC, corporation, and certain individual plaintiffs seeking to represent moderate income minority persons who claimed to seek housing in Arlington Heights. A Mexican-American resident of Arlington Heights and a local community organization, the Northwest Opportunity Center, intervened.

At the time of the decision of the Village Board in September of 1971, the Village had 5,239 existing multiple-family units. In addition to that, it had already zoned vacant areas for multiple-family use which would provide an additional 9,073 multiple-family units. Since 1962 the Village had considered 34 additional requests for R-5 rezoning that were not granted (R. 709). The Village had adopted a policy of utilizing R-5 multiple-family zoning districts as buffers between single-family zones and commercial, industrial and other high-intensity areas (R. 770).

After the denial by the Village of the Lincoln Green application, the Village Manager cooperated with respondents' Director of Real Estate in searching out other sites. Fourteen alternate sites in the Village were investigated; nine of them were rejected because they were too far removed from public facilities or were

surrounded by single-family areas; six other sites were rejected because the respondent MHDC thought them too expensive.

The corporate respondent had previously developed a 212 unit low and moderate income multiple-family project, Rand Grove Village, in an unincorporated area three-fourths of a mile outside the corporate limits of the Village. This site was one mile away from the Honeywell factory which is the principal employer of minority persons in the Village. The Lincoln Green site sought here was six miles removed from the Honeywell site. The nearest shopping center and school to Rand Grove is located two miles away, notwithstanding the fact that some sites in Arlington Heights were rejected because they were a mile or a mile and a quarter away from shopping facilities.

The 1970 population of the Village of Arlington Heights was 64,800. Based on the 1970 census data, the respondents' evidence showed that 3,244 blacks could afford to live in the Village (R. 588, 593). The respondents' demographer testified that 378 black households could buy housing in Arlington Heights, and 473 black households could rent housing in Arlington Heights based on economic data revealed by the census. He further testified that 2,500 blacks, who based upon the census data would be eligible for Lincoln Green housing, were also eligible for other housing in the Village (R. 595).

The respondents had made no survey of housing preferences of blacks employed in Arlington Heights, nor had they made an investigation of the number of blacks or Spanish speaking persons in Arlington Heights. Their evidence showed that Arlington Heights had the least industry of the surrounding communities (R. 629), and their expert characterized Arlington Heights as a dormitory suburb (R. 631).

The director of the intervenor Northwest Opportunity Center, testified that there were 188 families in a category of low or poverty income living in the Village, and they lived in a variety of housing (R. 481). The Village had financially sup-

ported the intervenor in 1971-72 and 1972-73. Some of the families they served had incomes too low to qualify for Lincoln Green. The organization served 1,500 families in the seven township area.

In August of 1973, there were 14,444 owner-occupied single-family homes and 6,085 multiple-family units in Arlington Heights. At the time of the MHDC zoning hearing, there was land zoned but not developed for a total of 9,073 multiple-family dwelling units. The vacancy rate for apartments in Arlington Heights according to the 1970 census was 11.5% (R. 798). At the time of the hearing before the Plan Commission, at least seven parcels which were zoned for R-5 multiple-family purposes, were for sale (R. 822).

The petitioner's evidence established the single-family character of the area in question and the consistent Village policy of utilizing the R-5 classification as a buffer between single-family use and commercial or industrial uses The subject property would not constitute such a buffer.

The petitioner's expert testimony indicated that the proposed development would have an adverse effect on adjacent property owners (R. 788, 793), and would have a detrimental effect on the value of single-family homes in the area (R. 931).

The petitioners also introduced evidence showing that the subject property could be economically developed for single-family homes at a price range comparable or higher than the existing single-family homes in the area (R. 929).

The respondent's own witnesses conceded that the subject property was suitable for single-family development on the unsubsidized market (R. 74), and that the property was worth at least $375,000 under the single-family classification (R. 471).

The trial court found that the respondents failed to carry their burden of proving discrimination by petitioners against racial minorities, 373 F. Supp. 208, 210. The Court pointed out that the weight of the evidence proves that the petitioners were

motivated by a legitimate desire to protect property values and the integrity of the Village's zoning plan, 373 F. Supp. 208, 211. It further found that low income workers do not have a constitutional right to low rental housing either where they work or elsewhere. The Court concluded that the zoning decision was not an arbitrary or capricious act in violation of the Fourteenth Amendment.

The Court of Appeals reversed the trial court, but in doing so generally sustained the findings of the trial judge. The District Court had found that the claim of a denial of equal protection had not been proven and the Court of Appeals declined to hold that that finding was clearly erroneous, 517 F. 2d 409, 412. The Court of Appeals also held that the District Court's finding that the petitioners were concerned with the integrity of the Village's zoning plan was not erroneous, 517 F. 2d 409, 412.

In reviewing evidence of other requested zoning changes in the Village, the Court of Appeals found that the evidence did not necessitate a finding that the Village was administering its buffer zone policy in a discriminatory manner. The Court of Appeals further recognized that merely because racial minorities constituted a higher percentage of the low and moderate income category, this disparity did not necessarily mean that the zoning change refusal had the type of racially discriminatory effect that required the invocation of the compelling interest test, recognizing the impact of this Court's decision in *James* v. *Valtierra*, 402 U. S. 137, 28 L. ed. 2d 678 (1971).

The Court of Appeals also noted that, based on economic factors, blacks would occupy five per cent of the housing in Arlington Heights, 517 F. 2d 409, 414, and conceded that the Village had not created the segregated housing pattern which the Court said existed in the entire Chicago area, 517 F. 2d 409, 414.

Notwithstanding these findings which were clearly indicated by the record, the Court of Appeals held that, under the facts

of the case, the Village's rejection of the Lincoln Green project had racially discriminatory effects. It applied the compelling interest test and concluded that the planning rationale behind the buffer zone policy and the fact that neighboring property might be diminished in value could not meet the compelling interest test. It concluded that since no compelling justification for the decision existed, the refusal to rezone was a violation of the equal protection clause of the Fourteenth Amendment.

Chief Judge Fairchild dissented, noting at the time of the Village's decision, there were at least nine undeveloped tracts of land in excess of 15 acres zoned for R-5 multiple-family use, and that the record did not contain a sufficient showing that it was not reasonably possible to construct the proposed project on one of these sites, 517 F. 2d 409, 416.

SUMMARY OF ARGUMENT.

I.

The zoning action complained of herein was undertaken by a legitimate desire to protect the integrity of the Village's zoning plan. It was predicated solely and completely upon sound zoning principles. The area in question is in the midst of a well established and uniform single-family area. The Village had more than 5,000 existing multiple-family units at the time of the zoning application and had zoned other areas for an additional 9,000 multiple-family units.

There were a substantial number of low income families residing in Arlington Heights and the census figures indicated that substantial numbers of blacks could afford to move to Arlington Heights. The zoning pattern of the Village was not conceived and did not operate to exclude black residents or low income families. The Village has consistently applied its policy of utilizing R-5 Multiple-Family Districts for buffer zone purposes. The mere fact that some blacks or Spanish speaking

persons, like whites, could not afford to live in single-family homes on the subject property does not require the Village to abandon its long established and rational zoning plan.

The trial court and the Court of Appeals found that the Village zoning policy was not administered in a discriminatory manner and that the Village was concerned with the integrity of its zoning plan. These findings were supported by the evidence and should not be disturbed.

The fact that the Zoning Ordinance might have a greater impact upon poor people or a minority group does not invalidate it. The fact that the Ordinance might exclude poor persons from residing on the subject property does not violate the Constitution, the Fair Housing Law, or the Civil Rights Acts. There is no fundamental constitutional right to housing, and the Court of Appeals erred in applying the compelling interest test.

II.

A zoning ordinance is presumed valid and the parties attacking it must show by clear and convincing evidence that it is invalid. A court will not substitute its judgment for that of the legislative body and federal courts do not sit as super zoning boards.

The ordinance in question is reasonable and is not on its face or in fact aimed at any racial or economic minority. The retention of a single-family classification on the subject property is a legitimate and valid exercise of the legislative discretion vested in the Village Board. There is substantial evidence in the record to indicate that the proposed development would have a detrimental effect upon nearby properties. The zoning is consistent with the established land uses in the area and the subject property is suitable for the purposes zoned.

III.

The respondents lack standing to bring this action. It is not a proper class action. The individual respondents have voluntarily resided in other communities and have not shown themselves to be in a class which was discriminated against by the Village. The individual intervenor already resides in Arlington Heights. The corporate respondent is a mere contract purchaser whose interest is dependent upon rezoning and therefore is not entitled to challenge the validity of the ordinance, particularly in the absence of the property owner as a party plaintiff; as a corporation, it has not been subject to racial discrimination.

The judgment of the Court of Appeals for the Seventh Circuit should be reversed and the decision of the trial court affirmed.

ARGUMENT.

I.

THE FAILURE TO GRANT THE REZONING REQUEST OF THE RESPONDENT DID NOT VIOLATE THE CIVIL RIGHTS ACTS, THE FAIR HOUSING LAW, OR THE FOURTEENTH AMENDMENT.

This is an action challenging the Zoning Ordinance of the Village of Arlington Heights as it applies to a 15 acre vacant tract of land zoned for R-3 single-family use. The tract is located in the heart of a single-family area which is also zoned for R-3 single-family use and is totally developed for single-family homes, parks, schools and churches, except for additional vacant land held by the owners of the subject property in conjunction with a boys high school and a clerical novitiate.

The Village of Arlington Heights, as both the trial court and the Court of Appeals recognized, refused to rezone the property to R-5 multiple-family purposes because the petitioners were motivated by a legitimate desire to protect the integrity of the Village's zoning plan. The action of the Village, as the trial court found, was predicated solely and completely upon sound zoning principles pursuant to the police power granted to the Village. The Court of Appeals refused to ascribe any racial motivation to the Village's action.

The respondents attempted to transform a simple zoning case into a civil rights action. They have attempted to raise issues of racial discrimination and alleged deprivation of constitutional rights in a situation where neither discrimination nor unlawful deprivation of constitutional rights was involved.

The Village's decision to prevent the development of multiple-family construction at a density of 15 units to an acre in the midst of a stable, well-established and uniform single-family

area, which had a density of 4 units to the acre, was consistent with its long-established policy and had none of the ulterior motives attributed to the petitioner by the respondents in this action. Any decision to rezone the 15 acres in question would have been spot zoning at its worst and would have destroyed the integrity of the zoning pattern and the master plan upon which the neighboring property owners and the community in general had long relied.

The evidence in the record indicates that the Village had at the time of the zoning application more than 5,000 existing multiple-family units. It had already zoned vacant areas for an additional 9,000 multiple-family units. There was a vacancy rate in existing apartment units in excess of 11%.

The respondent's evidence adduced by Bruce Newton, Executive Director of the intervenor, Northwest Opportunity Center, indicated that there were in fact at least 188 families in the category of low or poverty income living in the Village and that they lived in a variety of housing (R. 481). The respondent's witness, deVise, testified that, based upon economics and presumably on the zoning which the Village had previously granted, at least 3,244 blacks could afford to live in Arlington Heights based on the 1970 census. This evidence, standing alone, is clear and convincing that the zoning pattern of Arlington Heights was not conceived and did not operate to exclude black residents or low income families.

The record indicates clearly that the subject property is in all respects suitable for single-family purposes. Even the respondent's own real estate witness testified that the property was worth $75,000 more for single-family purposes than the purchase price for multiple-family purposes which the respondent, MHDC, had negotiated (R. 471).

The record is also demonstrative of a brisk and continuing demand for single-family homes in Arlington Heights and at the time of the application by MHDC, there was a vacancy rate in single-family homes of less than 1% (R. 801).

One of the intervening respondents, and in fact the only one that the trial court held had standing, Eluteria D. Maldonado, was a Mexican-American who resided in a single-family home in Arlington Heights and lived within 18 blocks of the Arlington Heights factory in which she worked. She was in fact the former owner of her home which had been taken over by her brother. The two other individual respondents who testified were black employees at the Honeywell factory in Arlington Heights and commuted to their work; however, the trial court found they did not present a definable or manageable class and had reasons other than racial discrimination for not choosing to live in the Village. 373 F. Supp. 208, 210.

There is no evidence that the defendant, Village, or any of the individual petitioners ever discriminated against MHDC, Maldonado, Guthrie, Ransom, or anybody else in any manner or tried to "zone them out" of Arlington Heights. There is no evidence in the record to indicate any discriminatory action on the part of the Village or the individual petitioners in violation of the federal statutes or the Constitution, and the trial court so found. These findings of fact were noted and not disturbed by the Court of Appeals.

The evidence in the record is clear and uncontroverted that the subject property is suitable for single-family development and can be economically developed for such purposes. It has always been zoned for that purpose. The 1959 Comprehensive Plan indicated that the property would remain in its single-family classification and that Plan has been followed.

The evidence is also clear that the entire area is developed for single-family homes, parks, schools and churches—uses which are permitted under the R-3 zoning classification. It is clear that hundreds of substantial single-family homes have been built and sold in the area in reliance upon the R-3 single-family classification.

The evidence in the record is also clear, as acknowledged by the trial court and the Court of Appeals, that the Village has

a definite policy of utilizing the R-5 multiple-family district for buffer zone purposes. Although the consistency of its application has been challenged by the respondents, both the trial court and the Court of Appeals held that the Village had in fact consistently followed this policy.

There is no rule of law, statute or decision prior to the opinion of the Court of Appeals in this case which requires that a municipality change an otherwise valid zoning ordinance merely because the developer seeks to use the property for low and moderate income housing. This is not a case involving a situation where the Village has rezoned the property in order to keep out a low or moderate income housing project or an effort to exclude development. The factual situation in this case is totally different from the cases of *Bailey* v. *City of Lawton,* 452 F. 2d 1037, and *Kennedy Park Homes Association* v. *City of Lackawanna,* 318 F. Supp. 669, where affirmative action of a discriminatory nature was taken to change zoning ordinances of a municipality specifically to prevent the development of a low or moderate income housing project.

The fact that the zoning ordinance makes land more expensive than the respondents desire does not thereby render the zoning ordinance invalid. The fact that a zoning ordinance which is otherwise proper may have a greater impact on the poor than other segments of society does not render the zoning ordinance invalid. The Fair Housing Act does not prohibit discrimination based on poverty, but merely discrimination based on racial grounds.

The mere fact that some blacks or Spanish-speaking Americans, like many other whites, could not afford to live in single-family homes which could be built on the subject property does not mean that Arlington Heights was required to abandon the long-established zoning plan which it sought to protect in this instance. Moreover, as the trial court pointed out, the corporate respondent, MHDC, had a contract which was

conditioned upon a 236 commitment which is now impossible to achieve because of the freeze on 236 developments.

There is no evidence in this record by which it could even be inferred that a racial motivation was present when the Village of Arlington Heights refused to spot zone in order to accommodate the desires of MHDC on this particular site. The fact that the action of the Village has an impact which might be felt by some members of a minority group does not constitute discrimination under the Fourteenth Amendment.

The finding of the trial judge that there was insufficient evidence to show discrimination by the Village against racial minorities should be dispositive of the whole controversy. The Court of Appeals in its opinion specifically found that the Village's zoning policy was not administered in a discriminatory manner and supported the District Court's findings that the Village was concerned with the integrity of the zoning plan.

The trial court stated that the basic issue was whether low income workers have a constitutional right to low rental housing either where they work or elsewhere and concluded that there is no such rule of law. The trial court's conclusion in this respect is of course well supported by the decisions of this Court and other federal courts throughout the country. *Village of Belle Terre* v. *Boraas,* 416 U. S. 1, 39 L. ed. 2d 797; *San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1, 36 L. ed. 2d 16; *Lindsey* v. *Normet,* 405 U. S. 56, 31 L. ed. 2d 36; *James* v. *Valtierra,* 402 U. S. 137, 28 L. ed. 2d 678; *Palmer* v. *Thompson,* 403 U. S. 217, 29 L. ed. 2d 438; *Acevedo* v. *Nassau County,* 500 F. 2d 1078; *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 500 F. 2d 1087; *Citizens Committee for Faraday Wood* v. *Lindsay,* 362 F. Supp. 651, *aff'd.* 507 F. 2d 1065; *Lawrence* v. *Oakes,* 361 F. Supp. 432.

The Court of Appeals however in reversing the trial court did not deal with that proposition nor does it cite any authority which would give special privileges with respect to housing and zoning to low income persons regardless of race. It is

implicit in its opinion however that low income persons apparently do have such special privileges if there is a possibility that there will be a higher percentage of racial minorities in their number. There is no basis in the Fourteenth Amendment or in any decision of this Court or any other court cited to support such a conclusion.

A. The Fact That the Zoning Ordinance May Have a Greater Impact Upon the Poor or a Minority Group Does Not Invalidate It.

The trial court found and the Court of Appeals recognized that the Village's Comprehensive Plan had been generally systematically followed. The trial court found that the evidence indicated a serious damaging of surrounding single-family homes and the trial court concluded that the weight of the evidence proves that the respondents were motivated by a legitimate desire to protect property values and the integrity of the Village's zoning plan. These findings were supported by the evidence and should not be disturbed. *Northcross* v. *Board of Education of Memphis,* 397 U. S. 232, 25 L. ed. 2d 246; *United States* v. *79.95 Acres of Land,* 459 F. 2d 185, 187; *Davis* v. *Cities Service Oil Co.,* 420 F. 2d 1278, 1279.

In reversing the findings of the trial court, the Court of Appeals offered no legal support for the proposition that a zoning ordinance, which is otherwise legitimate and well within the legislative discretion of the municipal body, is invalid because the result might be the exclusion of low income persons who in turn might be black. The logic of this decision would dictate that there can no longer be any single-family zoning districts in any municipality if a developer seeks to build housing which he can show might be occupied by a greater percentage of a minority group than presently existed in that municipality. The decisions of this court and courts of appeal around the country reject such a proposition.

There is no evidence in the record and neither the trial court nor the Court of Appeals could find any evidence by which it could be inferrred that a racial motivation was present when the Village refused to spot zone in order to accommodate the desires of MHDC on this particular site.

The Zoning Ordinance of the Village of Arlington Heights on its face does not discriminate against anyone because of their race of ancestry. The fact that a legal requirement may have a greater impact upon the poor or other minority does not render that requirement invalid under the equal protection clause. *James* v. *Valitierra,* 42 U. S. 137, 28 L. ed. 2d 678. At page 682, this Court said:

> "The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority."

In *Palmer* v. *Thompson,* 403 U. S. 217, 29 L. ed. 2d 438, this Court held that the closing of all public swimming pools by the City of Jackson was not unconstitutional, notwithstanding the fact that Negroes would be affected to a greater extent than whites.

In *Milliken* v. *Bradley,* 418 U. S. 717, 41 L. ed. 2d 1069, this Court in a school segregation case held that racial imbalance in itself is not to be equated with a constitutional violation calling for remedy. It indicated that the fact that Detroit schools were segregated did not require an inter-district plan outside the corporate limits, absent any showing that the suburban school district had in fact discriminated. Thus, the fact that Arlington Heights is located in the Chicago metropolitan area, which the Court of Appeals described as segregated, does not impose an affirmative duty upon the Village of Arlington Heights to change its otherwise valid Zoning Ordinance, absent a showing of discrimination by Arlington Heights in the administration of an ordinance clearly valid on its face.

Neither the trial court nor the appellate court was able to find such discrimination. *Milliken* v. *Bradley*, 418 U. S. 717, 41 L. ed. 2d 1069, 1091.

The fact that enforcement of municipal ordinances might have a greater impact on the poor of course does not render the ordinance invalid under the Equal Protection Clause. *James* v. *Valtierra*, 402 U. S. 137, 28 L. ed. 2d 678; *English* v. *Town of Huntington*, 448 F. 2d 319, 324; *Ybarra* v. *City of Town of Los Altos*, 503 F. 2d 250.

In *Ybarra*, the Court of Appeals for the Ninth Circuit refused to apply the "compelling interest" test in a case challenging a large lot zoning ordinance on the grounds that it excluded Mexican Americans. The trial court had found that the ordinance prevented poor people from living in Los Altos and that if Mexican Americans did not live there, it was because of poverty. The Court at page 253 said:

> "We agree that discrimination against the poor does not become discrimination against an ethnic minority merely because there is a statistical correlation between poverty and ethnic background."

The Court there based its decision on this Court's opinion in *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 36 L. ed. 2d 16. In *Rodriguez* this Court had held that there was no violation of the Fourteenth Amendment Equal Protection Clause by a state's school financing program which allegedly had the effect of discriminating against the poor.

In the case of *Warth* v. *Seldin*, ... U. S. ....., 45 L. ed. 2d 343, decided on June 25, 1975, this Court denied standing of certain petitioners to attack a zoning ordinance which they contended was exclusionary. The Court however recognized that it could be economics rather than discriminatory zoning which denied access to housing in the municipality in question. The Court noted at page 359:

> "Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary—that their inability to reside in Penfield is the consequences of the economics of the area housing market, rather than of respondents' assertedly illegal acts."

In the instant case if some poor people are denied housing in Arlington Heights it is the consequences of the economics of the area housing market rather than any allegedly illegal zoning carried out by the Village.

In the recent case of *Construction Industry Association of Sonoma County* v. *City of Petaluma*, No. 74-2100, decided August 13, 1975 by the Court of Appeals for the Ninth Circuit, that Court reversed the trial court and rejected the concept that an allegedly exclusionary zoning ordinance was a violation of the Fourteenth Amendment. At page 11 of the slip opinion, the Court said:

> "In attacking the validity of the Plan, appellees rely heavily on the district court's finding that the express purpose and the actual effect of the Plan is to exclude substantial numbers of people who would otherwise elect to move to the City. 375 F. Supp. at 581. The existence of an exclusionary purpose and effect reflects, however, only *one* side of the zoning regulation. Practically all zoning restrictions have as a purpose and effect the *exclusion* of some activity or type of structure or a certain density of inhabitants. And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose.[11] We must determine further whether the *exclusion* bears any rational relationship to a *legitimate state interest*. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation."

In the case of *Acevedo* v. *Nassau County*, 500 F. 2d 1078, the Second Circuit was considering the liability of Nassau

County, New York, for abandoning plans for constructing low-income family housing. At page 1080, the Court noted:

> "Appellees have no constitutional or statutory duty to provide low income housing. There is no 'constitutional guarantee of access to dwellings of a particular quality.' Lindsay v. Normet, 405 U.S. 56, 74 (1972)."

The Court went on to say at page 1082:

> "The Fair Housing Act does not impose any duty upon a government body to construct or to 'plan for, approve and promote' any housing."

In the case of *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 500 F. 2d 1087 (1974), the Sixth Circuit Court of Appeals held that the failure of Cleveland suburbs to enter into a cooperation agreement for the construction of federally assisted housing did not violate federal civil rights laws or the United States Constitution. The Court relied heavily on *Palmer* v. *Thompson*, 403 U. S. 217. At page 1093, it said:

> "In the present case the failure of the suburbs to provide low-rent housing affected alike both low-income blacks and whites. There may have been a greater impact on the blacks, but that, under Palmer, is not sufficient to establish a constitutional violation.
>
> In Lindsey v. Nomet, 405 U.S. 56 (1972), the Court held that no one has a constitutional right to adequate housing. Since a person has no right to public housing in his own city, it follows that he has no such right in a municipality in which he does not reside.
>
> See also Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), cert. denied, 397 U.S. 980, rehearing denied, 397 U.S. 1059 (1970), on neutral action of referendum."

The Court also cited *Citizens Comm. for Faraday Wood* v. *Lindsay*, 362 F. Supp. 651 and its reliance on *Palmer* and *Valtierra*.

The *Faraday Wood* case was affirmed by the Court of Appeals for the Second Circuit in 507 F. 2d 1065; the Court noted

there at page 1068: "While race has long been recognized as a suspect classification, low income status has not been so recognized."

In *English* v. *Town of Huntington*, 488 F. 2d 319, at page 324 the Court said:

> "We do not think the mere fact that the occupants of these buildings are blacks and Puerto Ricans prevents the Town from taking action it would be constitutionally entitled to take if they were white. It is an unpleasant fact of life that housing like this will be occupied by poor people, and a still more unpleasant one that black and Puerto Rican citizens are over-represented in that group. Yet the Supreme Court has only recently held that the mere fact that a requirement, otherwise proper, may have a greater impact on the poor, does not render it invalid under the Equal Protection Clause, James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971)."

The Fair Housing Act does not prohibit discrimination based on poverty. In *Kennedy Park Homes Association* v. *City of Lackawanna*, 318 F. Supp. 669, the Court at page 694 said:

> "The Fair Housing Act of 1968 covers discriminatory conduct in fair housing situations by both public and private alleged wrongdoers. However, the nature of the discrimination proscribed under the Fair Housing Act is limited in that it does not include discrimination based on poverty."

The fact that zoning makes land more expensive and prices it out of the market for single-family homes does not render the zoning ordinances invalid. *Confederacion de La Raza Unida* v. *City of Morgan Hill*, 324 F. Supp. 895. At page 897 in that case, the Court commented on the zoning ordinance and said:

> "It does not, on its face, by its expressed purposes, by its administration, or otherwise, discriminate against anyone or racial, ethnic or income grounds . . . It does not, therefore, conflict with any of the purposes or provisions of Title VIII of the Civil Rights Act of 1968 . . ."

The Court went on:

> "Reduced to its bald essentials plaintiffs' claim is that the Federal policies on low-income housing require that poor people be allowed to live wherever they like. The fact that legitimate zoning policies, based upon valid esthetic and other considerations adopted by local authorities may make certain land expensive is, plaintiffs seem to argue unlawful. The Court finds no such manifestation of intent in the National Housing Act or otherwise."

Thus, it must be concluded that the fact that the single-family zoning classification imposed on the subject property may have a greater impact upon the poor or upon a minority group because statistically the minority group may have a greater representation among poor, does not render the zoning classification thereby invalid under the Fourteenth Amendment, the Civil Rights Act, or the Fair Housing Act.

B. There Is No Fundamental Right to Housing and the Compelling Interest Test Should Not Be Applied.

While conceding that there was no discriminatory intent or discriminatory administration with respect to the Arlington Heights Zoning Ordinance, the Court of Appeals nevertheless applied the compelling interest test in holding the refusal to rezone the subject property to be a violation of the Equal Protection Clause of the Fourteenth Amendment. We respectfully suggest that such a determination flies in the face of the repeated decisions of this Court and other federal courts throughout the country. This Court has consistently refused to classify housing as a fundamental right and has refused to apply the compelling interest test in weighing challenges to legislative action based upon alleged violations of the Fourteenth Amendment.

Most recently in the case of *Village of Belle Terre* v. *Boraas,* 416 U. S. 1, 39 L. Ed. 2d 797, the Court pointed out in a zoning case that limiting occupancy under a zoning ordinance

involved no fundamental right guaranteed by the Constitution. The Court went on to say:

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 64 L.Ed. 989, 40 S.Ct. 560) and bears 'a rational relationship to a [permissible] state objective.' Reed v. Reed, 404 U.S. 71, 76."

Here, the protection of surrounding properties from depreciation and the preservation of the zoning ordinance are clearly permissible objectives.

In *Lindsey* v. *Normet,* 405 U. S. 56, 31 L. Ed. 2d 36, the Court held that social importance was not the critical determinate for subjecting legislation to strict scrutiny. The Court recognized the importance of decent, safe and sanitary housing, but it went on to point out that there was no constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy any particular dwellings. The Court concluded that, absent constitutional mandate, the assurance of adequate housing is a legislative not a judicial function. 405 U. S. 56, 74.

This Court in *James* v. *Valtierra,* 402 U. S. 137, 28 L. Ed. 2d 678, held that a legal requirement may have a greater impact upon the poor or other minority, but that does not render the requirement invalid under the Fourteenth Amendment.

To the same effect was this Court's decision in *San Antonio Independence School District* v. *Rodriguez,* 411 U. S. 1, 36 L. Ed. 2d 16, where the Court specifically held that there was no fundamental right to housing guaranteed by the Constitution. It cited *Lindsey* in pointing out that there was no constitutional mandate to assure adequate housing. The Court at 411 U. S. 1, 43, said:

> "As in the case of housing, the central importance of welfare benefits to the poor was not an adequate founda-

> tion for requiring the State to justify its law by showing some compelling state interest. See also, Jefferson v. Hackney, 406 U.S. 535, 32 L.Ed.2d 285, 92 S.Ct. 1724 (1972); Richardsen v. Belcher, 404 U.S. 78, 30 L.Ed.2d 231, 92 S.Ct. 254 (1971)."

In the *Rodriguez* case, the Court moreover rejected the concept that housing involved a suspect class.

These decisions are well summarized in the case of *Lawrence* v. *Oakes*, 361 F. Supp. 432, decided by a three judge panel in the District Court of Vermont. The Court there pointed out that, under the decisions of the United States Supreme Court, the compelling interest test is not to be applied in cases similar to that at bar. At page 440, the Court said:

> "At the outset, we reject plaintiff's argument that we should adopt the compelling interest test, a test that has been invoked by the Supreme Court only in cases in which the challenged provision impinged on a 'fundamental right,' or in which the class involved was a suspect class."

In the recent case of *Skillken & Co.* v. *City of Toledo, et al.*, Nos. 74-2116 and 74-2320, decided by the United States Court of Appeals for the Sixth Circuit on December 10, 1975, the Court was considering a suit brought under the Civil Rights Act to force the City of Toledo to rezone an area in a single-family neighborhood to permit the construction of low income housing. The Court of Appeals reversed the District Court which had ordered the rezoning. At page 20 of the slip opinion, the Court said:

> "The District Court erred in applying the compelling interest test, rather than a rational basis test, in determining whether Toledo's legislation was invalid. The ruling conflicted with our decision in *Mahaley* v. *Cuyahoga Metropolitan Housing Authority, supra.*
>
> *Lindsey* v. *Normet*, 405 U.S. 56 (1972), holds that no one has a constitutional right to adequate public housing. We rely also on *Citizens Comm. for Faraday Wood* v. *Lindsay*, 362 F.Supp. 651 (S.D.N.Y. 1973), which has

> since been affirmed by the Second Circuit Court of Appeals, 507 F.2d 1065 (2d Cir. 1974). . . .
>
> In *Palmer* v. *Thompson*, 403 U.S. 217 (1971), the Court held that a neutral policy which had a greater impact on a minority group was not invalid.
>
> The zoning laws in the present case are not inherently suspect. To apply the compelling interest test would virtually invalidate all forms of state legislation where people are affected differently.
>
> The compelling interest rule was rejected in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *San Antonio School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973); *James* v. *Valtierra*, 402 U.S. 137, 142 (1971); *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Citizens Comm. for Faraday Wood* v. *Lindsay, supra; Ranjel* v. *City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1969), *rehearing denied*, 397 U.S. 1059 (1970).
>
> It is significant that no attack has been made here on Toledo's comprehensive zoning ordinance. It was neutral legislation enacted long before the controversy in the present case arose."

It is thus clear therefore that, under the decisions of this Court, the right to housing, although socially of great significance, does not involve a fundamental constitutional right and the Court of Appeals' application of the compelling interest test is inappropriate and erroneous.

The Court of Appeals relied upon its own decision in *Clark* v. *Universal Builders, Inc.*, 501 F. 2d 324 in support of its determination that Arlington Heights had an affirmative duty to ignore its own Zoning Ordinance in order to take affirmative action to resolve the alleged segregated pattern of housing in the Chicago metropolitan area. We suggest that *Clark*, even if correct, requires no such mandate. The *Clark* case was decided on the question of the propriety of granting a directed verdict for the defendants at the close of plaintiffs case. Moreover, that case involved not municipal action pursuant

to an undoubted grant of police power, but involved actions by private parties taking advantage of a dual market in real estate with respect to price. The Court held that, when allegations were made which set up a prima facie case of two prices dependent upon race for housing in the same market, there was a violation of the Civil Rights Act. No such factual situation exists here. There is no evidence to indicate that blacks do not have equal access to housing in Arlington Heights at the same price as do whites.

The respondent's own evidence indicates that 378 black households could buy housing in Arlington Heights and 473 black households could rent housing in Arlington Heights (R. 588). deVise testified that 3,244 blacks could afford to live in Arlington Heights and that the range for black households is almost as wide as white households in expenditure for housing. Moreover, deVise's testimony did not take into account blacks who might be moving from houses in other communities to apartments in Arlington Heights, or blacks moving from apartments in other communities to houses in Arlington Heights. Thus, the *Clark* case, dependent as it is upon a dual housing market with respect to price, has no application to the case at bar where there are no allegations or evidence that there is a dual pricing system in Arlington Heights.

It must be concludeed that no matter how important housing may be, access to specific kinds of housing is not a fundamental constitutional right and the compelling interest test should not be applied in determining the validity of a zoning restriction. In this connection, however, the Court's attention is directed to the footnote appearing on page 20 of the *Skillken* case above. There the Court of Appeals for the Sixth Circuit said:

> "Even applying the compelling interest test, it is clear that Toledo had a valid public interest to protect its zoning laws from wholesale nullification, a result which would disrupt the entire community and would inflict heavy losses on many innocent people. Such zoning laws, enacted under the police power, 'are essential to orderly community development.' *Forest City Enterprises, Inc. Eastlake,* 41 Ohio St. 2d 187, 189, *cert. granted* Oct. 14, 1975, 44 U.S.L.W. 3222."

II.

THE RESPONDENTS FAILED TO OVERCOME THE PRESUMPTION OF VALIDITY ATTACHING TO THE ZONING ORDINANCE OF THE VILLAGE OF ARLINGTON HEIGHTS.

The law is well established that a zoning ordinance is presumptively valid and the party assailing its validity must show by clear and convincing evidence that it is invalid. If there is any room for a reasonable difference of opinion, the court will not substitute its judgment for that of the legislative body. *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 71 L. Ed. 303; *Village of Belle Terre* v. *Boraas,* 416 U. S. 1, 39 L. Ed. 2d 797; *McLarty* v. *Borough of Ramsey,* 270 F. 2d 232. Federal courts do not sit as super zoning boards. *Construction Industry Association of Sonoma County* v. *City of Petaluma,* No. 74-2100 (9th Cir. August 13, 1975).

The Court of Appeals conceded in its opinion that the trial court was not erroneous in concluding that the petitioners were concerned with the integrity of the Village's zoning plan. It also conceded that there was no discrimination in the enactment of the Zoning Ordinance in question. Nowhere in its opinion did the Court of Appeals suggest that the Village exercised its zoning powers with respect to the land in question in a discriminatory manner or that the respondents had succeeded in overcoming the presumption of validity attaching to the Zoning Ordinance.

Although the respondents have attempted to introduce the issue of racial discrimination and the Court of Appeals decided the issue on Fourteenth Amendment grounds, it is obvious that the only real question in this controversy is the reasonableness of

the zoning restriction, which both on its face and in fact is not aimed at any racial minority. The retention of a single-family classification on the subject property, which was surrounded by single-family homes and a high school and novitiate, which were permitted uses in the district, is a legitimate and valid exercise of the legislative discretion vested in the local authorities.

The fundamental rule was adopted by this Court in the landmark decision of *Euclid* v. *Amber Realty Co.*, 272 U. S. 365, 71 L. Ed. 303. In that case this Court specifically held that, if the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be controlling. At page 388, the Court said:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. Radice v. New York, 264 U.S. 292, 294, 68 L.ed. 690, 694, 44 Sup.Ct.Rep. 325."

In the more recent decision of *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 39 L. Ed. 2d 797, this Court summarized its broad holding in the *Euclid* case. At page 5 the Court said:

> The main thrust of the case in the mind of the Court was in the exclusion of industries and apartments and as respects that it commented on the desire to keep residential areas free of "disturbing noises"; "increased traffic"; and hazard of "moving and parked automobiles"; the "depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities." Id., at 394, 71 L Ed 303, 54 ALR 1016. The ordinance was sanctioned because the validity of the legislative classification was "fairly debatable" and therefore could not be said to be wholly arbitrary. Id., at 388, 71 L Ed 303, 54 ALR 1016.

The Court in *Belle Terre* at 416 U. S. 1, at page 5, referred to *Berman* v. *Parker*, 348 U. S. 26, 99 L. Ed. 27, in noting the broad scope of the police power, indicating: "We refused to limit the concept of public welfare that may be enhanced by zoning regulations."

In *Belle Terre* the Court was concerned with an attack involving equal protection rights under the Fourteenth Amendment. As here, the District Court had upheld the constitutionality of the ordinance, but the Court of Appeals had reversed. This Court specifically rejected the claim that fundamental constitutional rights were involved in a zoning ordinance which restricted occupancy of single-family dwellings. As here, it was charged that the ordinance bars people who were uncongenial to the present residents and that it expressed the social preferences of the residents for more congenial groups. It was urged that the ordinance was contrary to an open, egalitarian and integrated society. 416 U. S. 1, 7. This Court at pages 7 and 8 of its opinion used language which is particularly appropriate and diespositive to the case at bar. It said:

> It involves no procedural disparity inflicted on some but not on others such as was presented by Griffin v Illinois, 351 US 12, 100 L Ed 891, 76 S Ct 585, 55 ALR2d 1055. *It involves no "fundamental" right guaranteed by the Constitution,* such as voting, Harper v Virginia Board, 383 US 663, 16 L Ed 2d 169, 86 S Ct 1079; the right of association, NAACP v Alabama, 357 US 449, 2 L Ed 2d 1488, 78 S Ct 1163; the right of access to the courts, NAACP v. Button, 371 US 415, 9 L Ed 2d 405, 83 S Ct 328; or any rights of privacy, cf. Griswold v Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678; Eisenstadt v Baird, 405 US 438, 453-454, 31 L Ed 2d 349, 92 S Ct 1029. We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be " 'reasonable, not arbitrary' " (quoting Royster Guano Co. v Virginia, 253 US 412, 415, 64 L Ed 989, 40 S Ct 560) and bears "a rational relationship to a [permissible] state objective." Reed v Reed, 404 US 71, 76, 30 L Ed 2d 225, 92 S Ct 251. (Emphasis added.)

Echoing *Euclid's* determination that single-family areas may be constitutionally protected, the Court at page 9 noted:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a

land-use project addressed to family needs. This goal is a permissible one within Berman v Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

The Illinois Supreme Court has of course universally adhered to the proposition that the zoning ordinance is presumptively valid and the party assailing its validity must show by clear and convincing evidence that it is invalid. If there is any room for a reasonable difference of opinion, the court will not substitute its judgment for that of the legislative body. *Exchange National Bank* v. *County of Cook*, 25 Ill. 2d 434, 439; *Trendel* v. *County of Cook*, 27 Ill. 2d 155, 161; *Bennett* v. *Chicago*, 24 Ill. 2d 270, 273; *Sutter* v. *Village of Mundelein*, 27 Ill. 2d 589, 593.

The Supreme Court of Illinois in the recent case of *LaSalle National Bank* v. *City of Evanston*, 57 Ill. 2d 415, sustained the City of Evanston's Zoning Ordinance which, like the present ordinance, restricted residential density as applied to the subject property. The Court at page 428 of its opinion said:

> "The law governing the disposition of contentions challenging zoning classifications has been set forth in numerous decisions. As stated in *Exchange National Bank of Chicago* v. *County of Cook*, 25 Ill.2d 434, 439-40, 'It is always presumed, in an attack upon an ordinance, that the enactment is valid, and the burden of proving its invalidity falls upon the one who attacks the ordinance. (*Jacobson* v. *City of Evanston*, 10 Ill.2d 61.) Before a court will intervene it must be established by clear and convincing evidence that the ordinance, as applied to plaintiffs, is arbitrary and unreasonable and has no substantial relation to the public health, safety, or welfare. These rules are based upon a recognition that zoning is primarily a legislative function, subject to court review only for the purpose of determining whether the power, as exercised, involves an undue invasion of private constitutional rights without a reasonable justification in relation to public welfare. (*People ex rel. Joseph Lumber Co.* v. *City of Chicago*, 402 Ill. 321; *Morgan* v. *City of Chicago*, 370 Ill. 347.) Where it appears, from all the facts, that room exists for a difference of opinion concerning the reasonableness of a classification, the legislative judgment must be conclusive. (*Krom* v. *City of Elmhurst*, 8 Ill.2d 104.)"

The Illinois Supreme Court incidentally in the *LaSalle National Bank* case cited *Belle Terre* as authority.

In *LaSalle*, the Illinois Supreme Court cited *LaSalle National Bank of Chicago* v. *Cook County*, 12 Ill. 2d 40, as laying down the factors to be taken into consideration in determining the validity of a zoning ordinance. That decision has been followed in many other Illinois Supreme Court decisions. See, for example, *Garner* v. *City of Carmi*, 28 Ill. 2d 560.

The Court indicated the following facts to be taken into consideration in determining the validity of an ordinance: (1) the existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals and welfare of the public; (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has remained vacant as zoned, considered in the context of land developments in the area.

Applying each one of these criteria to the instant case, it is clear that the Zoning Ordinance of the Village of Arlington Heights, as applied to the subject property, is in all respects reasonable and constitutional. It is uncontroverted that the subject property is located in an area which is totally zoned and developed for single-family uses and schools, churches and parks, which are also permitted under the single-family classification.

In determining the validity of the particular zoning restrictions, the Court has emphasized the primary importance of the

character of nearby land uses. *Gregory* v. *City of Wheaton,* 23 Ill. 2d 402; *Jacobson* v. *City of Evanston,* 10 Ill. 2d 61; *Tuite* v. *City of Loves Park,* 82 Ill. App. 2d 214.

With respect to the extent to which property values are diminished by the particular zoning restriction, it must be pointed out that the evidence is clear that the property is worth more to the owners for single-family purposes than the contract price which MHDC is willing to pay. The contract calls for $300,000. The respondent's real estate expert, Mr. Foley, testified that the property was worth $375,000 under the existing R-3 classification (R. 471), and the petitioner's real estate appraiser, Gregory; Opelka testified that the property was worth $350,000 as zoned. It is the loss in value to the property owner which is critical, not the loss in potential value to the contract purchaser. *Jans* v. *City of Evanston,* 52 Ill. App. 2d 61, 71. Admittedly, the property is worth more for multiple-family purposes than it is for single-family purposes, but that is true in all zoning cases, and that fact does not render the restrictive zoning classification invalid. See, for example, *Bright* v. *City of Evanston,* 57 Ill. App. 2d 414, 432; *Cosmopolitan National Bank* v. *Mount Prospect,* 22 Ill. 2d 463, 470; *Jacobson* v. *City of Evanston,* 10 Ill. 2d 61, 68; *Harris Trust & Savings Bank* v. *City of Chicago,* 107 Ill. App. 2d 113, 121; *Bluhm* v. *City of Chicago,* 110 Ill. App. 2d 136.

The third criteria, the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public, also sustains the Zoning Ordinance. There is substantial evidence in the record, through the testimony of Opelka, and the Village planning experts, Rolf Campbell and Joseph Kesler, that the proposed development would have a detrimental effect upon the nearby properties (R. 788, 793, 876, 882, 931). The Illinois Supreme Court has recognized that when a controverted zoning ordinance protects against depreciation of nearby properties, that fact alone warrants sustaining its validity. *Trendel* v. *County of Cook,* 27 Ill.

2d 155, 164; *Bennett* v. *City of Chicago,* 24 Ill. 2d 270. Moreover, as this Court recognized in *Belle Terre,* the preservation of a single family area in itself protects and promotes the health, safety, morals and welfare of the public. The respondent MHDC, here is merely a contract purchaser and there is no loss in property value to the owner of the property since the owner is contractually bound to sell the property for a sum less than its value as presently zoned.

The relative gain to the public as compared to the hardship imposed upon the individual property owner lies in the preservation of the single-family character of the area. The evidence adduced by Kesler, Opelka and Campbell is clear and convincing that the public stands to gain through the single-family zoning with respect to the preservation of neighboring property values, protection against increased traffic, and the preservation of the integrity of the zoning plan. It is well settled that a municipality may reasonably restrict increases in population density as necessary for its health, safety and welfare. *LaSalle National Bank* v. *City of Evanston,* 57 Ill. 2d 415; *Lapkus Builders, Inc.* v. *City of Chicago,* 30 Ill. 2d 304, 309; *Exchange National Bank of Chicago* v. *County of Cook,* 25 Ill. 2d 434; 441; *Village of Belle Terre* v. *Boraas,* 39 L. ed. 2d 797.

The evidence with respect to the suitability of the subject property for the purposes zoned is really uncontroverted. The respondent, MHDC's, real estate director testified that the property was suitable for single-family development (R. 74); and Foley, the real estate appraiser (R. 471), testified it was worth $375,000 for single-family purposes. Kesler, Campbell and Opelka were all of the opinion that the property was suitable for the purposes zoned. The suitability of property for the purposes zoned is a major consideration in determining the validity of a zoning ordinance. *Bennett* v. *City of Chicago,* 24 Ill. 2d 270, 274; *River Forest Bank & Trust Co.* v. *Maywood,* 23 Ill. 2d 560, 562; *Treadway* v. *City of Rockford,* 28 Ill. 2d 370, 377.

The final criteria, the length of time that the property has remained vacant in the context of surrounding development, also

supports the zoning classification. The record shows that no effort has ever been made to develop the property for single-family purposes. Instead, it has remained part of the holdings of the Viatorian Fathers and used in connection with the high school and novitiate. Failure to adduce evidence to show that efforts were made to utilize the property for single-family residences indicates that the fact the property has lain vacant is not determinative. *Manger* v. *City of Chicago,* 121 Ill. App. 2d 358; *Western National Bank* v. *Village of Downers Grove,* 122 Ill. App. 2d 107. Here, of course, we have a purchaser who entered into a contract to buy the subject property knowing its restricted zoning classification. Contention as to loss of value is of diminished persuasion under such circumstances. *Lapkus Builders* v. *City of Chicago,* 30 Ill. 2d 304, 310; *Standard State Bank* v. *Village of Oak Lawn,* 29 Ill. 2d 465, 470, *LaSalle National Bank* v. *City of Evanston,* 57 Ill. 2d 415.

Thus, no serious attempt was made by the respondents to attack the reasonableness of the Zoning Ordinance on traditional zoning grounds. The Court of Appeals clearly did not attempt to make its determination in terms of normal zoning criteria. It in fact conceded that the ordinance would be valid if the "compelling interest" test was not to be applied. We have demonstrated above that the "compelling interest" test is not applicable because access to housing, even for low-income people, is not a fundamental constitutional right. It is clear that the respondents failed to overcome the presumption of validity attaching to the Zoning Ordinance of the Village of Arlington Heights. The legislative judgment of the Village officials must clearly prevail under the holdings of this Court in *Euclid* and in *Belle Terre* and the holdings of the Illinois Supreme Court.

We respectfully suggest that the Zoning Ordinance in question was a reasonable exercise of the unquestioned legislative authority vested in the Village of Arlington Heights. The specious claim that the ordinance was racially discriminatory, was clearly not supported by the evidence and contrary to the

factual findings of the trial court who heard all the witnesses and carefully examined all the evidence. We suggest that the factual situation is not really in doubt. Absent the Fourteenth Amendment claim, there can be no question but that the zoning restriction here challenged would stand.

We suggest that there is no basis in the Fourteenth Amendment or the decisions of this Court which would require the valid legislative decisions of the local municipal body to be set aside merely to permit occupancy by a low-income group that might in fact have a higher percentage of minority members than the percentage already residing in the community. To rule otherwise would destroy the basis of zoning law in this country and elevate racial consideration beyond the legitimate needs of the police power.

III.

THE RESPONDENTS LACK STANDING TO BRING THIS ACTION.

The Village had originally filed a motion to strike the complaint and dismiss the cause alleging in part that the respondents had no standing to bring this action in the first instance (A. 21, 23). In addition to the lack of standing alleged with respect to the individual respondents, it was pointed out that the Metropolitan Housing Development Corporation was, at best, a contract purchaser and thus lacked standing to attack the validity of the Zoning Ordinance. The Clerics of St. Viator, the admitted owner in fee of the subject property, was a necessary party to the case, but at no point was made a party plaintiff.

A predecessor judge denied the motion to dismiss and the trial court heard the matter on its merits (A. 34). The trial court found however that this was not properly a class action, 373 F. Supp. 208, 209, 210. The trial court however assumed for the purposes of its decision that the respondent corporation had sufficient interest in the property to give it standing to sue, but pointed out that the respondent corporation acquired no

different status than any other corporation merely because it has been created for the purpose of developing housing for low income tenants, 373 F. Supp. 208, 209.

Two black plaintiffs, who were non-residents of Arlington Heights, testified. One, Willie Ransom, resided in Evanston, another Chicago suburb, where he lived in a five-room house with his mother and son; he had never sought any housing in Arlington Heights and lived approximately 20 miles from Honeywell, his employer; his journey to work was approximately 45 minutes. The other, Arthur Guthrie, also employed by Honeywell, had originally lived 35 minutes away from the former location of Honeywell on the west side of Chicago; when Honeywell moved to Arlington Heights, he had moved further away to the south side of Chicago where he had bought his own home, a two apartment building, one unit of which he rented to a tenant. He had never asked any realtors to be shown housing in Arlington Heights (R. 221). The trial court concluded that the individual plaintiffs did not represent a definable and manageable class.

The intervenor, Eluteria Maldonado, was a Mexican American who resided in Arlington Heights and therefore clearly could not have been denied the right to live in Arlington Heights because of the Village's zoning pattern. She resided in a single-family home and worked at a plastics factory in Arlington Heights which was 18 blocks away from her home. She either drives or takes a taxi to work. Her brother presently owns the home in which she resides, although she had previously owned it. She had resided in two other places in Arlington Heights. Her present home contains three bedrooms and she formerly owned the house, but after her divorce her brother took it over.

The Court of Appeals did not deal in any manner with the question of standing. It is clear however that this Court's recent opinion in the case of *Warth* v. *Seldin,* ..... U. S. ....., 45 L. ed. 2d 343, is dispositive of the question. It clearly indicates that one of the plaintiffs here had standing to contest the Village's action. The Court of Appeals' decision was based solely on the Fourteenth Amendment; it made no decision with respect to the Civil Rights Act or the Fair Housing Act.

It should be noted that the not-for-profit intervenor corporation (Northwest Opportunity Center) has no standing under the doctrine of *Warth* v. *Seldin.* The non-resident black plaintiffs were not members of a class and clearly have no standing based upon their own factual situation. Under *Warth* v. *Seldin,* as non-residents, they would have no interest to bring this action. Maldonado was clearly not the victim of denial of equal protection because she was residing in the Village, and thus had not been "zoned out"; Metropolitan Housing Development Corporation, the other corporate respondent, had an interest which was contingent upon rezoning and upon the ability to secure 236 financing. The trial court specifically found that this latter corporation lacked the present capacity to carry out its proposed project. (B6, B7) This finding of fact was in no way disputed by the Court of Appeals which chose not to deal with this aspect of the situation. The actual owner of the property who might have had standing was not a party to the case.

The law is clear in Illinois that a contract purchaser whose contract is conditioned on rezoning, as is here the case, has no standing to challenge the validity of a zoning ordinance. *Clark Oil & Refining Corp.* v. *Evanston,* 23 Ill. 2d 48. This rule of law is even more compelling when, as here, the plaintiffs' rights were contingent not only on zoning but on securing financing under a program which no longer exists. Thus, the whole proposal may well be moot.

With respect to the Fourteenth Amendment question, it should be noted that the Court of Appeals specifically refused to set aside the trial court's finding that the Village had not discriminated in the application of its zoning ordinance in denying the rezoning requested for the subject property. The Court specifically noted that the evidence does not require the conclu-

sion that, had the proposed development been purely commercial, the requested change would have been granted (A. 4). Thus, the equal protection argument of the Fourteenth Amendment was specifically rejected not only by the trial court, but the Court of Appeals as well.

We suggest moreover that, as noted by the trial court, the corporate respondent acquires no different status than any other corporation merely because it has been created for the purpose of developing housing for low-income tenants.

The application of the Fourteenth Amendment to a corporation in order to prevent racial discrimination is improper under the present factual situation. The corporation has no racial identity. It is conceded that it was treated exactly the same as any other property owner in similar circumstances would have been treated. This Court has frequently held that the application of the Fourteenth Amendment to corporations under such circumstances is highly suspect. See, for example, the dissenting opinion of Mr. Justice Douglas in *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 576; *Western Turf Assn.* v. *Hyman Greenberg,* 204 U. S. 359, 51 L. Ed. 520; and *Selover Bates & Co.* v. *Walsh,* 226 U. S. 112, 57 L. Ed. 146.

We believe that this Court should reverse the Court of Appeals on the merits. We suggest however that under the doctrine of *Warth* v. *Seldin,* these plaintiffs were not entitled to be in the Federal Court in the first instance and that our motion to dismiss, which was acted upon by the District Court on October 3, 1972, would undoubtedly have been granted had this Court's decision in the *Warth* case then been available to the trial judge.

CONCLUSION.

Based on the foregoing, we respectfully suggest that the Court of Appeals for the Seventh Circuit erred in its decision and judgment. We respectfully pray that that judgment be reversed and the decision of the trial court affirmed.

Respectfully submitted,

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APPENDIX.

Amendment XIV, Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1866 (42 U. S. C. §§ 1981, 1982)

§ 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Civil Rights Act of 1871 (42 U. S. C. § 1983)

§ 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by

the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fair Housing Act of 1968 (42 U. S. C. §§ 3601, et seq.)

§ 3604. *Discrimination in the sale or rental of housing.*—As made applicable by section 803 [§ 3603 of this title] and except as exempted by sections 803(b) and 807 [§§ 3603(b), 3607 of this title], it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin. (Apr. 11, 1968, PL 90-284, Title VIII, § 804, 82 Stat. 83.)

§ 3605. *Discrimination in the financing of housing.*—After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: Provided, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 803(b) [§ 3603(b) of this title]. (Apr. 11, 1968, PL 90-284, Title VIII, § 805, 82 Stat. 83.)

§ 3606. *Discrimination in the provision of brokerage services.*—After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, or national origin. (Apr. 11, 1968, PL 90-284, Title VIII, § 806, 82 Stat. 84.)